

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARC OLIN LEVY,
Plaintiff,

v.

NORTHWESTERN MUTUAL LIFE
INSURANCE CO.,
Defendant.

Case No. [5:14-cv-04116 EJD](#)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Re: Dkt. No. 11

On August 13, 2014, Plaintiff Marc Olin Levy ("Plaintiff") filed a Complaint in Santa Clara County Superior Court against Defendant Northwestern Mutual Life Insurance Company ("Northwestern") after unsuccessfully applying for a sales position at Northwestern. Plaintiff seeks \$200,000,000 in compensatory and punitive damages against Northwestern based on the allegation that he was "illegally disqualified from employment . . . for not having a Bachelor's Degree." Northwestern removed the action to this court on September 11, 2014.

Federal jurisdiction arises under 28 U.S.C. § 1332. Presently before the court is Northwestern's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Docket Item No. 11. Plaintiff did not file a timely opposition to the motion.¹

¹ The court understands that Plaintiff is proceeding without legal representation and for that reason has reviewed the document he filed on October 17, 2014 (Docket Item No. 15), despite its tardiness. See *Abassi v. Immigration & Naturalization Serv.*, 305 F.3d 1028, 1032 (9th Cir. 2002). It has not been construed as an opposition to the motion to dismiss, however, because "pro se litigants are bound by the rules of procedure" in the same manner as represented parties, and

1 This matter is suitable for decision without oral argument pursuant to Civil Local Rule 7-
2 1(b). Accordingly, the hearing scheduled for February 12, 2015, is VACATED. Having carefully
3 considered all relevant materials, the court finds, concludes and orders as follows:

4 1. A motion under Federal Rule of Civil Procedure 12(b)(6) can be granted if a
5 plaintiff fails to plead each claim with sufficient specificity to “give the defendant fair notice of
6 what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp. v. Twombly, 550 U.S.
7 544, 555 (2007) (internal quotations omitted). The factual allegations “must be enough to raise a
8 right to relief above the speculative level” such that the claim “is plausible on its face.” Id. at 556-
9 57. “Well-pleaded factual allegations” are considered true (Ashcroft v. Iqbal, 556 U.S. 662, 664
10 (2009)), and the court construes the alleged facts in the light most favorable to the plaintiff (Love
11 v. United States, 915 F.2d 1242, 1245 (9th Cir. 1988)). The court may also consider material
12 submitted as part of the complaint or relied upon in the complaint, and may also consider material
13 subject to judicial notice. See Lee v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001).
14 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal
15 theory or sufficient facts to support a cognizable legal theory.” Mendondo v. Centinela Hosp.
16 Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

17 2. Here, the Complaint’s minimal content suggests that Plaintiff’s employment
18 discrimination claim is based either on an unspecified rule or regulation promulgated by the
19 Financial Industry Regulatory Authority (“FINRA”)², or on the absence of such a rule requiring
20 that employees of member firms meet certain educational prerequisites. See Compl., Docket Item
21 No. 1 (“I believe this to be Employment Discrimination. This is a direct violation of FINRA Code
22”); see also Answer to Mot. to Dismiss, Docket Item No. 15 (“Nowhere in FINRA code does
23 it state that a candidate for employment with a FINRA regulated company can be barred from
24

25 Plaintiff does not explain why the document was filed two weeks after the opposition deadline set
26 by Local Rule 7-3. Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995).

27 ² “FINRA is a self-regulatory organization that has the authority to exercise comprehensive
28 oversight over all securities firms that do business with the public.” Goldman, Sachs & Co. v.
City of Reno, 747 F.3d 733, 737 (9th Cir. 2014).

1 employment for not having a college degree”). Plaintiff, however, cannot state a claim under
 2 FINRA regulations because they do not provide for a private right of action. Fox v. Lifemark Sec.
 3 Corp., 12-CV-6650, 2015 U.S. Dist. LEXIS 2061, at * (W.D.N.Y Jan. 8, 2015) (“FINRA does not
 4 provide a private right of action, thus even if defendants violated FINRA rules, plaintiff cannot
 5 recover”); Richman v. Goldman Sachs Group, Inc., 868 F. Supp. 2d 261, 275 (S.D.N.Y.
 6 2012).

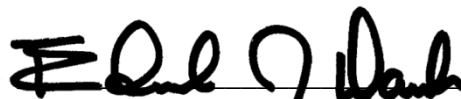
7 2. Similarly, Plaintiff cannot state a claim under Title VII of the Civil Rights Act of
 8 1964 (“Title VII”), 42 U.S.C. §§2000e, et seq., or the Fair Employment and Housing Act
 9 (“FEHA”), California Government Code § 12940, because educational attainment is not a
 10 protected class under either statutory scheme. See EEOC v. Fed. Express Corp., 558 F.3d 842,
 11 849 (9th Cir. 2009) (explaining that Title VII “proscribes various employment practices involving
 12 discrimination on the basis of ‘race, color, religion, sex, or national origin.’”); see also Cal. Gov’t
 13 Code § 12940(a) (prohibiting discrimination based on “race, religious creed, color, national origin,
 14 ancestry, physical disability, mental disability, medical condition, genetic information, marital
 15 status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and
 16 veteran status”). Plaintiff also failed to allege exhaustion of administrative remedies in the
 17 Complaint, nor did he clarify that issue in the document filed in response to the Motion to
 18 Dismiss. See 42 U.S.C. § 2000e-5(b) (Title VII exhaustion requirement); see also Cal. Gov’t
 19 Code § 12965(b) (FEHA exhaustion requirement). Exhaustion is a pre-condition to a claim under
 20 either section. B.K.B. v. Maui Police Dep’t, 276 F.3d 1091, 1099 (9th Cir. 2002); Basurto v.
 21 Imperial Irrigation Dist., 211 Cal. App. 4th 866, 879 (2012).

22 Based on the foregoing, the court concludes that Plaintiff has not stated a claim against
 23 Northwest. Thus, the Complaint must be dismissed under Rule 12(b)(6). Moreover, since
 24 discrimination based on educational attainment is not a cognizable legal theory under the federal
 25 and state employment discrimination statutes, the dismissal will be without leave to amend. See
 26 Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1051 (9th Cir. 2008) (“Dismissal without leave to
 27 amend is proper if it is clear that the complaint could not be saved by amendment.”). Judgment
 28 will be entered in favor of Northwest. The Case Management Conference is VACATED and the

Clerk shall close this file.

IT IS SO ORDERED.

Dated: February 9, 2015



EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California